COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

9 NORTH WALKER STREET DEVELOPMENT, INC.

v.

REHOBOTH BOARD OF APPEALS

No. 99-03

DECISION

June 11, 2003

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

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DECISION

I. PROCEDURAL HISTORY

On April 7, 1999, the 9 North Walker Street Development, Inc. submitted an application to the Rehoboth Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 44 units of mixed-income affordable ownership housing on Bliss Street in Rehoboth, to be financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston. After due notice and public hearings, the Board unanimously denied the permit in a decision filed with the town clerk on September 14, 1999. From this decision the developer appealed to the Housing Appeals Committee. At a Conference of Counsel held before the Committee on October 14, the matter was continued to give the parties opportunity to negotiate. The parties agreed to further local proceedings to consider the development, and that approach was formalized in the Committee's Order of Remand of December 1, 1999.

In May, the Board again denied the comprehensive permit, primarily on procedural grounds, and the developer renewed its appeal. A further conference of counsel was held in June 2000, and the evidentiary portion of the hearing was scheduled to begin in October. The original developer withdrew from the proceeding, and the owner of the site, Kelly Development, LLC, stepped into its place.[1] The first evidentiary hearing session was delayed until June 7, 2001, at which point the Board moved for further remand, arguing that it had not had an opportunity to review the development plans in their latest iteration. The Committee briefly heard testimony from the principal of Kelly Development, LLC, and then granted the motion for remand, and established a fixed schedule for the parties to consider the unresolved issues concerning a proposal for 37 detached homes. See Order of Remand (June 7, 2001).

By decision filed with the town clerk on October 26, 2001, the Board granted a comprehensive permit with conditions, the most significant of which was the reduction in the size of the proposal to 16 units. The developer continued to pursue the appeal, alleging that the conditions are so onerous as to make construction of the proposal uneconomic.

Three more evidentiary sessions were held, beginning with a site visit in February 2001.[2] Following the presentation of evidence, counsel submitted post-hearing briefs.

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1. There were also changes in counsel representing the parties.

2. The parties prepared a joint Pre-Hearing Order (Feb. 28, 2001), in which they stipulated that the developer satisfies the three jurisdictional requirements found in 760 CMR 31.01(1), that is, that it is a limited dividend organization, that it controls the site, and that the project is fundable by a subsidizing agency. Pre-Hearing Order, §§ I-15 to I-17. The Board also conceded that Rehoboth has not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, §§ I-14.

Unlike most such orders, the Joint Pre-Hearing Order did little to clarify the issues to be presented at the hearing. See Tr. III, 98-99; and, e.g., Tr. IV, 9-10, 18-20. This is but one example of the difficulties encountered throughout the proceedings. A further indication is that after the last evidentiary session of the hearing was completed, the developer filed a motion to exclude the testimony of all members of the environmental consulting firm of Horsley & Witten. The developer

II. FACTUAL BACKGROUND

The developer's current proposal is to build 37 three-bedroom, single-family houses on land that is off Bliss Street near Fairview Avenue in Rehoboth. Tr. II, 15, 29, III, 30. The entire site is 57 acres, of which about half is wetlands. Tr. II, 30; Exh. 10, sheet 2; 29. Thirteen houses are proposed on several acres of upland where the project roadway will enter the site from Bliss Street; the roadway will then cross about 400 feet of wetlands to a slightly larger upland area, where the remainder of the houses would be built. Exh. 10, sheet 2; 29; Tr. II, 20-21. The developed upland area totals about 20 acres. Exh. 19, p. 17; 10, sheet 2. There is also an isolated seven-acre upland area that will be given to the town and remain undeveloped. Tr. II, 20-21, 31-32; Exh. 14, p. 2. The site is zoned for residences on 60,000 square-foot lots. Tr. II, 23.

III. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in aggregate make construction of the housing uneconomic. See 760 CMR 31.06(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8,

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accuses the firm of unprofessional behavior. We see no benefit in examining the allegations and counter-allegations, and we hereby deny that motion. In actuality, this matter was handled poorly by both sides throughout the litigation. The experts who testified generally provided useful information, and the developer's geologist and wetlands expert Jerome Carr, in particular, was among the most knowledgeable and credible expert witnesses we have encountered. Overall, however, we have been left with a badly organized and confusing record, but one that we must nevertheless examine and give meaning to.

(Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that "the conditions imposed… make it impossible to proceed… and still realize a reasonable return as defined b the applicable subsidizing agency…" 760 CMR 31.06(3)(b); also see G. L. c. 40B, § 20.

Evidence concerning the economics of the proposed development was not presented clearly by either side. Thomas Grossi, the principal of Kelly Development, LLC, testified in a conclusory manner, and *pro forma* financial statements were introduced into evidence. See Tr. III, 31-33. The *pro forma* for the proposed 37-unit projected showed a profit of approximately $800,000. Exh. 7. The *pro forma* based on the 16-unit development that was approved by the Board showed a projected loss of $484,700. Exh. 27. Mr. Grossi explained, primarily on cross examination, that the reason for the loss was that many costs, including site preparation costs and roadway costs, remained nearly the same no matter what the size of the development. Tr. III, 32, 41.

In addition, the developer testified that he submitted his 16-unit *pro forma* to the bank that is to provide the New England Fund (NEF) financing for the development, and that the bank denied the loan application. Tr. III, 31-33. This is confirmed by a one-sentence letter from a bank officer.[3] No one from the bank testified, however, and there is no evidence that the bank did a thorough review of the project's finances or evaluated the accuracy or appropriateness of the figures used in the *pro forma*. Under these circumstances, the letter alone is not sufficient proof to establish a presumption pursuant to 760 CMR 31.07(f) that the conditioned project is uneconomic.

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3. The letter says, "I am in receipt of your request for a waiver in our decision to deny your loan, unfortunately our decision to deny remains the same." Exh. 26.

The Board raised a number of questions about the figures provided in the *pro forma*s. As will be seen, these not only indicate that the developer failed to meet his burden of proof, but actually lead us to conclude that the developer will be able to make a profit building the 16-unit development approved by the Board. We will examine the project's finances using the developer's *pro forma* as a guide. See Exh. 27.

The first question is what sales price for the market-rate units should be used in calculating revenues available to the project. The developer's *pro forma* shows the sale of the eleven market-rate units for $320,000 each. His own expert witness, however, testified that they would be worth $400,000.[4] Tr. III, 81-82. Thus, each house will sell for $80,000 more than shown on the *pro forma*, and $880,000 in additional revenues will be available.

Second is the question of the sales price for the affordable units. The developer has committed to selling them for $94,500 each, and this is shown properly on the *pro forma*. The Board argues that the units could be sold for as much as $150,000, making $275,000 in additional revenue available. Although, as the Committee's chairman noted during the hearing, it is possible that the proper figure for the affordable units is part way between the figures offered by the two parties, no evidence (other than a conclusory statement by the one of the Board's witnesses) was introduced at the hearing as to what the actual maximum sales price permitted under the NEF is. For the sake of argument, we will give the developer the benefit of the doubt, accept the lower figure, and will not adjust the revenues upward on this basis, as the Board asks us to.

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4. In his report, the appraiser indicated that typical prices of new homes in the area range from $325,000 to $425,000. Exh. 19, p. 27. During the hearing, on cross examination, he was initially questioned about houses ranging from $375,000 to $400,000, and then confirmed that market-rate houses on this site would sell for $400,000.

Next is the matter of the proper value to assign in the *pro forma*s for site acquisition cost, which is often a point of contention between developers and Boards. Developers sometimes attempt to assign a high value to the land either because in anticipation of receiving a comprehensive permit, they actually paid more than the land is worth under existing zoning, or because a high value minimizes the profit shown on the *pro forma*. In fact, a relatively high value, $1,450,000, was used in the initial *pro forma* that the developer prepared for the 37-unit proposal. Exh. 7; Tr. III, 36. The Board objected to this figure, and therefore the developer used the figure suggested by the Board, $500,000, in the second *pro forma*. Exh. 27; Tr. III, 37-39.

Neither party presented sufficient evidence to enable us to unambiguously establish the value of the property under existing zoning. On cross-examination, the developer testified that he paid $600,000 for the land. Tr. I, 47. That testimony was not developed to establish whether that reflected the parcel's true value.

Somewhat more helpful evidence was presented by a licensed real estate appraiser who testified on behalf of the developer.[5] His expert opinion was that buildable lots in this area, with little or no regard to their actual size, are worth $48,000. Tr. III, 72, 75, 77, 83. It would be a simple matter to estimate the site's value if we knew how many buildable lots—under existing zoning—it contains. This, however, was not addressed directly during the hearing. But there were several oblique references to a 1997 subdivision approval. See, e.g.,

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5. There were slight discrepancies between this witness's testimony and his written appraisal, and there were weaknesses in his analysis as well. At the simplest level, on page one of the appraisal he identified the subject property as containing 40 lots, while on page 25, his analysis shows 37 lots. A more serious problem is that his appraisal is based on the value of the lot with a comprehensive permit rather than under existing zoning. Therefore, we rely primarily on his testimony, though we note that there is fundamental consistency in his position since the appraisal notes, "Developers…

Tr. III, 67. Counsel for the developer implied that that approval was for 23 lots, and the appraiser answered that that would only be relevant if "that subdivision was done [with] the current zoning of 60,000 [square feet per lot]." Tr. III, 85. (A parcel with 23 lots valued at $48,000 each would be worth $1,104,000.) But it seems unlikely that the parcel can be developed "as of right" with 23 lots since it would be illogical for the Board to grant a permit for a comprehensive permit for fewer lots than already have a valid approval under the Subdivision Control Law. Though the underlying facts were not presented to us, we might infer from the appraiser's response that a 23-lot subdivision was approved in 1997, but that it is no longer valid. Further, we might infer that this 20-acre parcel, with wetlands on parts of it and now zoned for 60,000 square-foot lots, could be developed under the Subdivision Control Law as approximately a dozen lots, which, at $48,000 each, would be worth—very approximately—a half million dollars.

Such a figure is consistent with the developer's testimony that his cost was $600,000. And both of these are consistent with the $500,000 figure that the Board asked the developer to use in his 16-unit *pro forma*, and that he did in fact use when he submitted that *pro forma* to the bank. Tr. III, 37. Based upon all of these considerations, we find that the appropriate acquisition cost for the site is $600,000. Thus, in calculating anticipated profit, the developer's costs will be $100,000 higher than shown on his 16-unit *pro forma*.

Finally, the Board questioned whether some site preparation costs and soft costs will not in fact be lower for the smaller development. If this is true, this would also increase the developer's profit. We make no finding with regard to this, however, since there is

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are paying between $40,000 and $60,000 per lot depending on approvals, location, number of lots and infrastructure costs." Exh. 19, p.33.

insufficient evidence before us. Tr. III, 108-111; IV, 115.

To summarize, the developer's 16-unit *pro forma* shows a loss of $484,700. But his revenues will be $880,000 higher than anticipated. This is partially offset by $100,000 in increased acquisition costs. Thus, the proper projection shows a profit of $295,300 instead of a loss.[6]

We recognize that a certain amount of unpredictability is inherent in profit projections. But the affordable units here will not be sold for less than $94,500, and they may well be sold for more.[7] Similarly, site preparation costs will certainly not be higher for the smaller development, and it is not unlikely that, as the Board argues (see above), those costs will be reduced. Under these circumstances, the developer has not met the burden of proving that the conditions imposed by the Board make building of the housing uneconomic, and we therefore affirm the decision of the Board.

IV. LOCAL CONCERNS

Since the applicant has not sustained its initial burden, we need not consider whether the Board has proven that there is a valid health, safety, environmental or other local concern that supports each of the conditions imposed. But there are only three significant issues

6. This represents about a 7% profit on total development costs of about four and one half million dollars. No evidence was presented by the developer as to what level of profit is adequate compensation, nor as to whether it is the dollar amount of the profit or its percentage in relation to development costs that is more germane.

7. Of course, the developer may not set the price of the affordable units arbitrarily. Our regulations have recently been amended to require in cases such as this, where funding is provided through a non-governmental entity, that a state agency such as the Massachusetts Housing Finance Agency (MassHousing), issue final project approval. 760 CMR 31.09(3), also see 760 CMR 31.0(2)(g). If the developer wishes to sell the affordable units at prices greater than $94,500, the sales price must be approved using that procedure. See § V-2(d), below.

presented to the Committee, and two of these have some general applicability and are easily disposed of. Therefore, we believe that it is worthwhile to briefly review them.

A. Stormwater

Considerable time was spent during the hearing on the design of the proposed development's stormwater management system. But since Rehoboth has no local wetlands bylaw, it is by no means clear why this Committee had to hear any evidence on this issue. See Chairman's comments, Tr. III, 60-64. Nevertheless, the developer opened this area of inquiry, and not only avowed its commitment to complying with the state Department of Environmental Protection (DEP) Stormwater Management Policy (which is enforced under the Wetlands Protection Act, G.L. c. 131, § 40), but also introduced detailed evidence of how the system will comply. Tr. II, 15-39, 79-84.

We have noted in the past that logically the Board should not be permitted to inquire into an issue or place restrictions on affordable housing if the town has not previously regulated the matter in question. See *Walega v. Acushnet*, No. 89-17, slip op. at 6, n. 4 (Mass. Housing Appeals Committee Nov. 14, 1990); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n. 3 (Mass. Housing Appeals Committee Jan. 16, 1991). Since there was no evidence of a local wetlands bylaw or that Rehoboth has enacted stormwater requirements that would apply to market-rate development of this site,[8] to allow the town to regulate such issues for this development would violate the Comprehensive Permit Law's provision that local "requirements and regulations are [to be] applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20.

8. The Board's expert witnesses acknowledged that the concerns they raised were raised under state law and procedure. See, e.g., Tr. III, 49-50, 99, 103.

We have made exceptions to this general rule, but it cannot be argued here, as in our *N. Attleborough* and *Hopedale* cases, that the proposed development is so different from the housing that would have been permitted under existing zoning that it raises stormwater concerns that were not anticipated by the town. See *Dexter Street, LLC v. N. Attleborough*, No. 00-01, slip op. at 6 (Mass. Housing Appeals Committee Jul. 12, 1990); *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 15 (Mass. Housing Appeals Committee Jan. 23, 1992). Nor can it be said, as in *Acushnet* and *Hopedale*, that the stormwater issues are not likely to be considered by any other state agency if they are not considered by the Housing Appeals Committee. See *Acushnet, supra*, slip op. at 6, n.4; *Hopedale, supra*, slip op. at 15. On the contrary, this development, like any other affordable housing development proposed under the Comprehensive Permit Law, must comply with the state Wetlands Protection Act (WPA). The developer must apply to the Rehoboth Conservation Commission with regard to WPA issues, and any disputes about compliance will be adjudicated not by us, but by the state Department of Environmental Protection pursuant to WPA procedures.

B. Separation of wells and septic systems

Extensive evidence was also received with regard to the location of wells and septic systems for the proposed houses. The Board's concern was that wells and septic systems were not separated sufficiently to ensure that drinking water would be safe from nitrates leaching into the groundwater from the septic systems. State law requires that wells and septic systems be separated by 100 feet.[9] To permit the 37-unit proposal, the Board was

9. Once again, considerable time was spent debating whether the design will comply with state Title 5 (310 CMR 15.000) requirements, and the local requirement was not even mentioned until the

asked to waive a regulation of the Rehoboth Board of Health that requires 150 feet of separation; it declined to do so, indicating instead that its condition permitting only 16 units on larger lots responded to the need for greater separation.[10]

Certainly, nitrates in wells are a real public health concern. To protect children's health, there is a federal standard for nitrates in drinking water of 10 milligrams per liter (mg/l or ppm).[11] Tr. II, 75-76; IV, 75. There can be little doubt that Rehoboth's 150-foot separation requirement is related to that concern, and thus is legitimate in the most general sense. But the specific question, which would have been before us if the developer had met its burden with regard to economics, is whether the Board proved an actual public health risk with regard to this particular site and design, and whether that legitimate local concern outweighs the regional need for housing. That is, is the 150-foot requirement necessary in the specific factual circumstances presented here, or should it be waived?

In addressing this, we note that the 150-foot separation requirement did not establish a nitrate-concentration standard. Thus, we need to refer to the federal standard as a point of reference in determining whether the proposal creates a pubic health hazard. That is, conceptually, we must assume that in enacting the 150-foot requirement, Rehoboth, after considering the idiosyncrasies of its soils and geology, had made a judgment that in most locations greater separation was required to meet the drinking water purity standard, and not

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end of the last day of testimony. See, e.g., Tr. II, 48, 51, 65; IV, 29, 52-56, 73; IV 80. Title 5 requirements are of little concern to us since they must be met in any case.

10. Arguably, the Board could have issued a less restrictive permit by simply requiring the developer to comply with the 150-foot requirement. Neither party addressed this question, however.

11. Nitrification of coastal areas or ponds or of public water supplies, as well as of private wells, is of concern, and some municipalities have enacted requirements that certain types of development prepare a "nitrogen budget" to prove that concentrations of nitrates in aggregate will not rise above

that it had determined that water deemed safe elsewhere is unsafe for its residents.[12] The question before us would have been whether the Board proved that the soils and geology of this particular site is such that the 37-unit design would result in nitrate concentrations greater than the federal standard. If so, we would uphold the condition; if not, we would waive the 150-foot requirement.

The developer's position is that the site is atypical, and that the models that dictate separation of wells and septic systems do not apply. See Tr. II, 55-60. The wells will be "driven to depth of 100 to in excess of 300 feet" into sedimentary bedrock. Tr. II, 56. Credible testimony based upon a written report was received from an experienced geologist that the water drawn from such wells "comes from substantial distances away and not from on site." Tr. II, 57; Exh. 24, 25-A, 25-B, 25-C. Further, there was credible testimony from the same expert that the aggregate nitrogen budget for the site shows that ground water concentrations will actually be less than 5 mg/l. Tr. II, 65; Exh. 24.

The Board challenges these conclusions. Its expert geologist testified, also with the support of written reports and graphics, that "the bedrock fractures are connected to the surface more than they are to areas that are far away from the site," and nitrates could flow directly from septic systems into wells. Tr. IV, 64, 29. In addition, he prepared his own nitrogen budget based on a slightly different analysis of hydrogeologic areas within the site, and determined that groundwater concentrations would range from 11 to 14 mg/l. Tr. IV, 45-46; Exh. 21, 28-31.

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certain levels—typically 5 mg/l instead of federal standard of 10 mg/l. There is no evidence of such a requirement in Rehoboth.

12. This appears to be the case from a letter to the Board from the Chairman of the Rehoboth Board of Health, though this was not explored through testimony. Exh. 12 , p. 2 and Attachment C.

At the close of the hearing, neither side had explained the hydrogeology of the site clearly, and equally important, neither was able to convincingly identify errors or incorrect assumptions underlying the other's reasoning. As a result, we cannot confidently draw any conclusion as to how much separation between wells and septic system is necessary on this particular site. But this confusion, particularly in light of the Board's failure to prove what scientific basis may underlie the general town requirement for the 150-foot separation, would make it very difficult for us to conclude that the Board proved a legitimate local concern that outweighs the need for housing—the conclusion necessary to uphold imposition of a requirement stricter than the state, Title-5 requirement for this proposal.

C. Proportion of units to be affordable

In its decision, the Board required that 30% of the total houses built be affordable to low or moderate income families.

The minimum proportion of units that must be affordable in comprehensive permit projects is 25%. See *Stuborn Ltd. Partnership v. Barnstable*, No. 79-05, slip op. at 9 (Mass. Housing Appeals Committee Mar. 5, 1999); *Cedar Street Assoc. v. Wellesley*, No. 79-05, slip op. at 9 (Mass. Housing Appeals Committee Mar. 4, 1981), *aff'd,* 385 Mass. 651, 433 N.E.2d 873 (1982). But under some circumstances, a higher proportion is appropriate. For instance, in the state's Homeownership Opportunity Program (HOP, now called the Homeownership Program), the affordable housing program that was most active a decade ago and which is similar in many respects to the NEF, the subsidizing agency required and continues to require that 30% of each comprehensive permit development be affordable to low or moderate income households. 760 CMR 20.05.

The NEF, the program under which the housing here is proposed, does not, as we

have noted before, specify many programmatic details. See *Stuborn Ltd. Partnership v. Barnstable, supra*, slip op. at 19, 21. Specifically, "the percentage of affordable units has not been set…. Therefore it is left for negotiation between the developer and the town…." *Id.* at 21-22. If the parties were not able to establish a mutually agreeable figure by negotiation, it was proper for the Board to do so by condition.

But whether the Board has adequately defended its requirement that 30% of the new housing be affordable in this particular case is a separate question. It introduced very little evidence in this regard, and, arguably, the implication of the testimony that *was* presented is that the 30% requirement was set arbitrarily. The Board's expert testified that "the town is fully aware that it has… plenty of affordable housing, but reaching the 10% status of 40B it has very little [eligible subsidized housing]. …[T]he Board saw no reason why it could[n't] ask for 30 or 50%…." Tr. IV, 98-99. We are reluctant to draw conclusions from such limited testimony, but based upon our reasoning in *Archstone Communities Trust v. Woburn*, No. 01-07, slip op. at 19-21 (Massachusetts Housing Appeals Committee Jun. 11, 2003), we find that the Board has not articulated a reasonable factual or legal justification for this condition, and therefore it should be eliminated. Therefore, only 25% or four of the 16 approved housing units need be affordable.

V. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit by the Rehoboth Board of Appeals. The permit is subject to the clarifications or additional requirements provided in the text of this decision and in the conditions below:

1. The comprehensive permit shall generally conform to the comprehensive permit filed with the Rehoboth Town Clerk on October 26, 2001 (the 2001 Comprehensive Permit), which is Exhibit 8 in this proceeding, except as provided in this decision. This Committee does not necessarily endorse each and every provision in the 2001 Comprehensive Permit that is not discussed in this decision.

2. The comprehensive permit conditions shall be modified or added as follows:

(a) In the event of a conflict between section E-2(a) of the 2001 Comprehensive Permit and section D-1 or any other section of the 2001 Comprehensive Permit, section E-2(a) shall control; that is, construction of 16 housing units shall be permitted even if it is not possible, e.g., to do so and observe the requirements in section D-1 concerning lot size and frontage.

(b) No further review by the Conservation Commission or other local boards (see, e.g., section D-1(d) of the 2001 Comprehensive Permit) shall be permitted except with regard to issues controlled by state law, e.g., the state Wetlands Protection Act. Also see 760 CMR 31.09.

(c) 25% or four of the housing units shall be affordable units to be sold to low or moderate income households.

(d) The affordable units shall be sold for $94,500. If, prior to construction, the developer believes that a higher sales price may properly be charged under the requirements of the New England Fund, then, pursuant to the final project approval procedures in 760

CMR 31.09(3),[13] the developer may apply to the Massachusetts Housing Finance Agency (MassHousing) for approval of such higher price. Any such application to MassHousing shall be subject to the payment of such fees as are then in effect.

(e) The Regulatory Agreement, Deed Rider, Monitoring Services Agreement and any related documents shall be reviewed pursuant to the final project approval procedures in 760 CMR 31.09(3), and not by the Board or other town officials or representatives.

(f) In lieu of a subdivision plan, the Board shall, as a ministerial act pursuant to 760 CMR 31.09(3), approve a Comprehensive Permit Plan suitable for recording purposes, and such Plan shall be recorded prior to construction.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) All construction shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) All construction shall comply with applicable state laws, and in particular,

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13. With regard to other aspects of final approval, it appears that pursuant to 760 CMR 31.10, recent changes in § 31.09(3) do not apply to the 9 North Walker Street Development, Inc. proposal. How such procedures might or might not be applied, however, was not raised during the hearing, and on such matters we defer to the interpretation of the various relevant state and federal agencies.

wetlands crossings and stormwater drainage designs shall be approved under the state Wetlands Protection Act.

(c) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(d) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

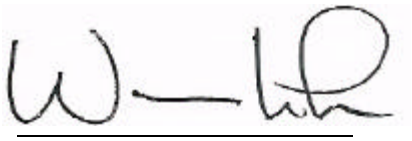
(e) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(f) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code. See 760 CMR 31.09(3).

5. Should the Board fail to carry out this order within thirty days, then pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

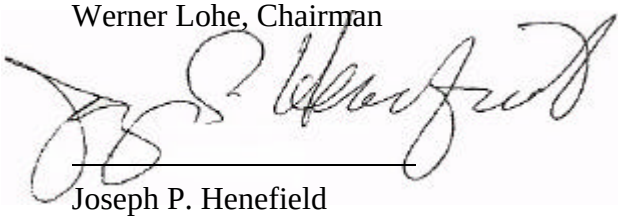
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee



Werner Lohe, Chairman

Dated: June 11, 2003



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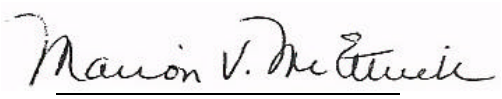

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